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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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The United States contests a prerequisite of relief which it admitted had been met in the Court below. Respondent contests the requested Writ of Certiorari upon the ground that the mitigation provisions (Sections 1311 through 1315 of the Internal Revenue Code of 1954) are inapplicable to the instant case since the Commissioner's determination with respect to the Petitioner's disposition of stock does not ". . . affect the basis of the stock or result in a double inclusion or disallowance . . ." (Brief for the United States in Opposition, p. 4). Accordingly, it is now argued by Respondent that Petitioners have not met one of the statutory requisites for employing the mitigation provisions to rectify the Commissioner's error.

The United States recognizes that it admitted in the Court below that the prerequisite it now contests had been satisfied.

(See Brief for the United States in Opposition, p. 4, footnote 2, See also Pet. App. C pp. 5-6.) Based upon this admission, Respondent's Motion for Judgment on the Pleadings was granted on a completely different ground which conflicts with decisions of several Federal Circuit Courts of Appeal. (See cases cited in Petition, p. 6.) The United States avoidance of a discussion of the conflict existing as to the basis upon which the case was decided by the United States Court of Claims is a tacit admission that the conflict exists and must be resolved by this Court.[1]

Respectfully submitted,

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1. The ground upon which the United States now seeks to avoid the granting of the Petition for a Writ of Certiorari further supports the necessity for issuance of the Writ. The government admitted for purposes of its Motion for Judgment on the Pleadings in the United States Court of Claims "(4) That this is [sic] a duplication or similar result described in one of the paragraphs of Section 1312, correction of which was barred at the date of the determination." (Br. p. 7.)

Based upon this admission, the United States Court of Claims assumed for purposes of the Respondent's Motion for Judgment on the Pleading that all the prerequisites for the application of the mitigation statutes were present except that the Commissioner of Internal Revenue had maintained an inconsistent position. (Pet. App. C pp. 5-6.)

The government's admission before the United States Court of Claims dispelled any necessity for proof on the issue now raised by the Government. The admission below opened the way to the government's cavalier denial before this Court that the requirement had not been met. Only by the granting of this Petition will Petitioners be afforded an opportunity to prove the incorrectness of Respondent's improper denial.